IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

JUDGMENT
IN

S.B. Civil Second Appeal No.165/1984

Gopal S/o Shri Ramjilal
...defendant-appellant
Versus
Raghuveer S/o Shri Parsadi
...plaintiff-respondent

Date of Judgment ::: 18th of August, 2006

PRESENT
HON'BLE MR. JUSTICE NARENDRA KUMAR JAIN

Shri G.K. Garg with
Mrs. Sangeeta Sharma for defendant-appellant
Shri R.P. Agarwal for
Shri B.P. Agarwal for the plaintiff-respondent
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By the Court:-

The defendant-appellant has filed this second appeal under Section 100 of the Code of Civil Procedure (for short, 'the C.P.C.') against the judgment and decree dated 18.4.1984 passed by the Additional District Judge No.1, Bharatpur, whereby he dismissed the appeal of the defendant-appellant and affirmed the judgment and decree dated 11.1.1983 passed by the Munsiff & Judicial Magistrate, Weir, District Bharatpur, in Civil Suit No.56/1976, whereby the suit of the plaintiff-respondent for declaration and permanent injunction was decreed.

This court, while admitting the second appeal on 7th of August, 1984, formulated the following questions of law:-

"1. Because the learned court

below made a mistake of law and gave perverse finding that since defendant could not prove that Bhoti had any other house in Helna, except the house in question, therefore, it is fully proved that the Gharghuda in the alleged will was in respect of the house in question.

2. Whether in a suit for declaration and permanent injunction, relief of the possession could be given without averment in the plaint?"

Brief facts giving rise to this second appeal are that the plaintiff-respondent Raghuveer filed a suit for declaration and permanent injunction in the lower court against defendant-appellant Gopal, wherein it was pleaded that Mst. Bhoti was aunt of the plaintiff. She executed a registered will dated 30.5.1975 in respect of her movable and immovable property in favour of the plaintiff. The description of the disputed property, i.e. piece of land, was given in Para 4 of the plaint. It was further pleaded that the defendant has no right whatsoever in the property, in dispute. On 29.1.1976 the defendant started digging the foundation to raise construction of a house over the disputed piece of land, therefore, it became necessary for the plaintiff to file the present suit to declare that the disputed property belongs to the plaintiff and the plaintiff is the actual owner-in-possession of the property, in dispute, and the defendant be restrained by way of permanent injunction not to make any interference in the peaceful possession of the plaintiff and not to raise any construction over it. It was also pleaded that an

injunction in mandatory form may also be issued directing the defendant to demolish the construction raised during the pendency of the suit.

The defendant filed his written statement wherein he denied the contents of the plaint. It was pleaded that Mst. Bhoti did not execute any will dated 30.5.1975 in favour of the plaintiff and the same was not got registered. It was also pleaded that the property, in dispute is an ancestral property of the defendant and he is in possession of the same since the time immemorial, therefore, it was prayed that the suit of the plaintiff be dismissed.

The learned lower court, on the basis of the pleadings of the parties, framed six issues. Issue no.1 is as to whether Mst. Bhoti was the owner of the property, in dispute, or not. Issue no.5 is whether the property, in dispute, was ancestral property of the defendant. Issue no.2 is in respect of execution of the will dated 30.5.1975 and whether the plaintiff is the owner of the disputed property on the basis of the said will. Both the parties led their evidence in support of their cases. The learned lower court, vide its judgment and decree dated 11.1.1983, decreed the suit of the plaintiff and declared that the plaintiff is the owner of the property, in dispute, and the defendant is not the owner of the property, in dispute. The defendant was directed to remove his 'chhappar', articles as well as possession from the disputed property within a period of two months and to handover the possession of the

same to the plaintiff. The defendant was also restrained by way of injunction not to interfere in the peaceful possession of the plaintiff and for not raising any further construction on it. The first appellate court affirmed the finding of the lower court in respect of all the issues and dismissed the appeal of the defendant vide its judgment dated 18.4.1984. Under these circumstances the present second appeal has been filed by the defendant-appellant.

Learned counsel for the defendant-appellant contended that both the courts below committed an illegality in recording a finding in respect of issues no.1 and 5 in favour of the plaintiff, only on the ground, that the defendant could not prove that Mst. Bhoti had any other house in village Helna except the disputed house, whereas the burden of proof of this fact was on the plaintiff, therefore, both the courts below have committed a serious illegality in deciding issues no.1 and 5 in favour of the plaintiff and against the defendant. He also contended that the present suit was for declaration and permanent injunction whereas the learned lower court granted a decree of possession also, which is without jurisdiction and on this count also the judgments and decrees passed by both the courts below are liable to be set aside.

Learned counsel for the plaintiff-respondent contended that the suit of the plaintiff for declaration and permanent injunction has been decreed by the lower court as well as the lower appellate court, both, and all the substantial questions framed in the present case are

relating to question of facts and both the courts below have recorded a concurrent finding of facts in favour of plaintiff and against defendant and it is a settled proposition of law that this court in second appeal under Section 100 of the CPC cannot interfere in the finding of fact and as such the present second appeal is, therefore, liable to be dismissed. He further contended that so far as the substantial questions of law formulated by this court on 7.8.1984 is concerned, the same were formulated ex-parte without hearing the plaintiff-respondent. The questions formulated by this court, as reproduced above, go to show that they are relating to questions of fact and there is concurrent finding in this regard by both the courts below. He further contended that in case the questions of law are formulated in absence of the plaintiff-respondent, in that event the plaintiff-respondent has every right to contend before this court at any subsequent stage or at the time of hearing of the case that particular substantial question of law formulated cannot be said to be a substantial question of law and there is no need to decide the same.

Learned counsel for the defendant-appellant, in rejoinder, contended that once the substantial questions of law are formulated then it is not open for the respondents to contend that no substantial questions of law involves in the case and that the questions of law so formulated by this court are relating to question of fact, therefore, there is no merit in the contention of the learned counsel for the plaintiff-respondent in this regard and this court

should decide both the substantial questions of law formulated by this court.

I have heard learned counsel for both the parties and minutely scanned the impugned judgments as well as the record of both the courts below.

Before deciding the substantial questions of law formulated by this court, as reproduced above, it is necessary to decide the question as to whether the respondent is entitled to contend at the time of hearing of the appeal, which was admitted ex-parte and questions of law formulated in his absence, that the present appeal does not involve any substantial questions of law and the substantial questions of law so formulated are relating to question of fact only. In this connection it is necessary to refer sub-section (4) of Section 100 of the C.P.C., which lays down that where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question. It is commonly known that second appeals are initially listed before the High Court for admission and it is not necessary to hear the respondents at the stage of admission of the second appeal. If the High Court is satisfied that a substantial question of law is involved in any case then it can admit the second appeal and formulate that question as substantial question of law. Where the second appeal is admitted ex-parte then the right of the respondent does not go automatically to contend before the High Court that no substantial question of law involves in the second appeal. Sub-section (5) of

Section 100 of the C.P.C. Is very clear in this regard, which provides that the second appeal shall be heard on the question so formulated and the respondent, shall, at the hearing of appeal, be allowed to argue that the case does not involve such question.

In Corporation of City of Bangalore Vs. Syed Iqbal Hussain – (2005) 9 SCC 362, the Hon'ble Supreme Court considered the similar controversy and held that the question of law is required to be formulated by the High Court at the time of admission of the appeal and the respondent is entitled to show that the question so formulated by the High Court does not involve such a question.

In Govindaraju Vs. Mariamman – (2005) 2 SCC 500, the Hon'ble Apex Court held that Section 100 of the C.P.C. reserves liberty with respondent against whom appeal was admitted ex-parte and the questions of law had been framed in his absence, to argue that the case did not involve the questions of law framed.

In view of the above discussion and law laid down by the Hon'ble Apex Court, it is clear that sub-section (5) of Section 100 of the C.P.C. reserves liberty with the respondent against whom appeal is admitted ex-parte and the questions of law are framed in his absence, to argue that the case did not involve the questions of law framed, therefore, the learned counsel for the plaintiff-respondent is at liberty to submit that the case do not involve such questions of law so framed.

The question no.1, framed in the present case, relates to identity of the property, in dispute. The plaintiff-respondent has given the description of the property in Para 4 of the plaint. The registered will has also been placed on the record by the plaintiff. The plaintiff's witnesses have also described the identity/description of the property, in dispute. Both the courts below have recorded a concurrent finding in this regard and I find that no substantial question of law arises in this respect, which is required to be heard and decided in the second appeal under Section 100 of the C.P.C. Under these circumstance, I am of the view that the question no.1 formulated by this court is purely a question of fact and there is concurrent finding by both the courts below in this regard in favour of the plaintiff-respondent. The question no.1 formulated by this court relates to issues no.1 and 5 framed by the lower court and both the courts below have decided issues no.1 and 5 in favour of the plaintiff-respondent and decreed his suit.

Now I proceed to decide the question no.2 formulated by this court, which, for the ready reference, is reproduced again as under:-

> “2.Whether in a suit for declaration and permanent injunction, relief of the possession could be given without averment in the plaint?”

The plaintiff, in Para 5 of the plaint, pleaded that the defendant has no concern with the property, in

dispute, but on 29.1.1976 he started digging the foundation on the disputed plot to raise construction over it and wanted to occupy the same and also gave threatening to the plaintiff that he would take the possession of the plot, in dispute, and that he would dispossess the plaintiff. The cause of action for filing the suit, as mentioned in the plaint, accrued on 29th of January, 1976. In the prayer clause (c) of the plaint it is prayed that by way of mandatory injunction, the construction raised during the pendency of the suit be ordered to be demolished.

From the contents of the entire plaint, it appears that there was an apprehension in the mind of the plaintiff-respondent that although he is in possession on the disputed land but the defendant-appellant may dispossess him, therefore, a prayer was made that in case any construction is raised by the defendant-appellant over the disputed plot then the same be ordered to be demolished by issuing an injunction in the nature of mandatory form. The lower court, while deciding issue no.1, recorded a finding that the defendant-appellant has taken the disputed piece of land in his possession during the pendency of the suit. The lower court also framed issue no.3 to the effect “whether on 29.1.1976 the defendant gave a threatening to the plaintiff for his dispossession.” The issue no.3 was decided in favour of the plaintiff and against the defendant and it was observed that the defendant has got the possession of the disputed property forcefully, therefore, the plaintiff is entitled to get the possession

of the same back. The finding of the lower court has been affirmed by the lower appellate court also, therefore, there is concurrent finding of fact to the effect that the defendant dispossessed the plaintiff from the property, in dispute, and both the courts below have directed that the plaintiff will be entitled to get the possession of the disputed property back.

In this connection it will be appropriate to refer and reproduce the Rule 7 of Order 7 of the C.P.C., which lays down that it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. The Order 7 Rule 7 is reproduced as under:-

> "7. Relief to be specifically stated.- Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement."

In Bhondoo Vs. Udatoo – AIR 1970 Allahabad 307, the Allahabad High Court held that the trial court can mould relief and grant decree as required by merits of case. The relevant Para 6 reads as under:-

> "6. The next contention of learned counsel for the defendants-appellants is that the plaintiff-respondent had merely prayed for a prohibitory injunction and the lower

> appellate Court should not have granted a mandatory injunction instead. It cannot be disputed that the appellate Court had as wide a jurisdiction as the trial Court in granting relief, and it is now settled law that when disposing of a suit the trial Court has power to mould the relief and to grant such appropriate decree as is called for by the merits of the case. ...”

In Milka Singh & Others Vs. Diana & Others – AIR 1964 Jammu & Kashmir 99, the Jammu & Kashmir High Court held as under:-

> “It cannot be contended that since the usual mode of proceeding is to bring a suit for possession, the remedy by way of a mandatory injunction is barred in view of S.56 (I) of the Specific Relief Act, 1877.”

In Bhupatlal Govindji Vs. Bhanumati Dayalal – AIR 1984 Gujarat 10, the Gujarat High Court, in Para 9 of the judgment, held as under:-

> “9. In this view of the matter, I find that the learned appellate Judge was right in granting the mandatory injunction. It is no doubt true that the learned appellate Judge while directing the defendant to remove the locks on the premises also has directed to hand over delivery of possession without any court-fees having been paid by the original plaintiff. It is to be remembered that the effective relief that has been granted is the relief of injunction and delivery of possession is a consequential relief. The question of court-

> fees need not worry the defendant-appellant because ultimately it is for the Court and the Government to deal with it. I would not say that the question of court-fees would not arise, because what the Court has done has been done by it as a part of its duty to uphold the administration of justice. Here the question of court-fees becomes immaterial.”

In Zahira Habibullah Sheikh Vs. State of Gujarat – (2004) 5 SCC 353, the Hon'ble Supreme Court held as under:-

> “...Every prayer need not always be by a separate application, unless such prayer is the only relief sought or that the proceedings filed had no other claim by way of relief. If the basis of grievance has been sufficiently disclosed openly and the relief sought is one among other specified as incidental or ancillary to the main relief and the court had the power to grant it, the fact that there is no formal or specific application which, if at all, may be relevant for purposes of determining the court fee to be paid only, does not in any way undermine the powers of the court to accord relief, so long as the request in this regard has been indisputably made and was also responded to by the parties before the court. ...”

The above discussion of facts of the present case, coupled with the legal position as considered by various High Courts and Hon'ble the Apex Court, I find that as per the O.7 R.7 of the C.P.C. it is necessary that every plaint shall state specifically the relief which the plaintiff

claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for.

The lower court as well as the lower appellate court are empowered to mould relief and grant decree as required by merits of case. It is not necessary to make each and every prayer in the plaint but if main relief has been prayed for in the plaint then ancillary reliefs can always be granted by the courts. Therefore, the question no.2 formulated by this court, as reproduced above, is answered in the manner that in a suit for declaration and permanent injunction, relief of possession could be granted by the courts below, if there is averment in the plaint that defendant has threatened the plaintiff that he will dispossess him from the disputed land and raise construction thereon and prayer also made to the effect that whatever construction raised during pendency of the suit by defendant, be ordered to be demolished.

So far as present case is concerned, I find that the plaintiff filed a suit for declaration and permanent injunction, wherein it was also pleaded that the defendant wanted to dispossess the plaintiff and the prayer was also made to demolish the construction raised by the defendant during the pendency of the suit. Therefore, it cannot be said that there was no pleading or prayer about relief pertaining to the possession. The relief pertaining to demolition of the construction raised by the defendant

amounts to relief for possession of the disputed property and even otherwise, as discussed above, the main relief in the present case was about declaration of right of the plaintiff over disputed property and demolition of construction on disputed land raised by defendant during pendency of the suit. The possession of the disputed property was only a consequential relief and, as such, both the courts below did not commit any wrong or illegality in passing a decree of possession also in favour of the plaintiff-respondent.

In view of the above discussion, I do not find any merit in this second appeal and the same is accordingly dismissed, with no order as to costs.

(Narendra Kumar Jain) J.

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